IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

W.W. ADCOCK, INC., :
CIVIL ACTION
Plaintiff, :
:
v. :
:
FORT WAYNE POOLS, INC., :
Defendant. :
NO. 95-3565

MEMORANDUM & ORDER

J.M. KELLY, J. **JUNE , 1997**

Presently before the Court are cross-motions for summary judgment in the above-captioned matter. As an initial issue, the Court shall resolve choice of law questions raised by the respective parties. As the cross-motions for summary judgment require the Court to rely upon significant factual inferences that are subject to dispute, they shall be denied.

BACKGROUND

Plaintiff, W.W. Adcock, Inc. ("Adcock"), is a distributor of swimming pools and spas. Adcock's main office is in Pennsylvania and additional offices are located in Maryland and Virginia. Fort Wayne Pools, Inc. ("Fort Wayne") manufactures swimming pools and spas and its main office is located in Indiana. Prior to 1985, Adcock manufactured a line of spas known as "Freedom Spas." In 1985, Adcock provided Fort Wayne with a mold for a "Liberty Spa II" and the parties entered into a contract whereby Fort Wayne would manufacture acrylic spa mold shells for Adcock.

Subsequently, Adcock provided Fort Wayne with 12 additional molds, two of which were purchased by Fort Wayne and one which was jointly owned. For approximately nine years, Fort Wayne manufactured Freedom Spas for Adcock and Adcock sold pools and other spa lines manufactured by Fort Wayne. Business between the parties was conducted by purchase orders, invoices, letters, telephone and personal contact. No other formal contracts between the parties were ever prepared.

In late 1994, Adcock apparently became concerned about the quality of the spas manufactured by Fort Wayne. Adcock contacted Robert Lauter ("Lauter") of LA Spas to discuss LA Spas taking over as manufacturer of Freedom Spas. Lauter had been a Sales Manager for Adcock from 1979 to 1988 and a Vice President for Fort Wayne from 1988 to 1994. Adcock shipped three shells to LA Spas so that it could produce prototypes of a refurbished line of Freedom Spas to be inspected by Adcock. Upon inspecting LA Spas' prototypes, Adcock decided on December 14, 1994 to shift the manufacture of Freedom Spas to LA Spas. In order to have models ready for an Atlantic City trade show in early 1995, LA Spas needed to have molds by December 23, 1994. Adcock claims that showing its products at the Atlantic City trade show was essential to presenting its line for the 1995 season.

Adcock attempted to call Fort Wayne to request that three molds be shipped to LA Spas and faxed a letter on December 19, 1994, requesting that three of the molds be prepared to be picked up on December 23, 1994. Fort Wayne refused by fax on December 19,

1994, stating "[w]ill be unable to cooperate until other financial and logistical matters are resolved." The parties attempted to negotiate through several more faxes until Adcock decided to remain with Fort Wayne manufacturing Freedom Spas on December 21, 1994, purportedly because they would be unable to get molds to LA Spas in time to prepare models for the Atlantic City trade show. On December 22, 1994, Fort Wayne replied by stating that it believed it was in the best interest of both companies to "disengage our relationship concerning your Freedom Spa line." Fort Wayne also announced that it intended to seek other distribution channels for its pools in areas where Adcock was its distributor because Adcock was not selling only Fort Wayne's products.

While Adcock was trying to remove its spa manufacturing from Fort Wayne, Fort Wayne apparently reached the breaking point on its ongoing attempt to convince Adcock to distribute Fort Wayne products exclusively. Fort Wayne opened a distribution facility only minutes away from Adcock's Virginia site. Fort Wayne attempting to expand the scope of its northern New Jersey office to include sales to the Philadelphia area. There is evidence that Fort Wayne attempted to hire Adcock employees and use the contacts of those employees to take sales away from Adcock.

As a result of this falling out among the parties, Fort Wayne did not ship all of an "Early Buy" order to Adcock.[1] Adcock

[1] Fort Wayne's "Early Buy" program allows a distributor to order at the end of a swimming pool sales season and the distributor can purchase stock at current prices that will be used during the next season. The distributor defers payments

was forced to bring in new product lines at the same time it was gearing up for the upcoming season. Adcock's Complaint asserts counts for 1) breach of contract in not shipping all of the Early Buy order, 2) breach of contract in not returning the molds upon demand, 3) Fort Wayne's breach of a duty of care as a bailee, 4) breach of contract granting Adcock an exclusive territory as well as the implied covenant of good faith and fair dealing in that contract and 5) fraudulent misrepresentation. Fort Wayne's Counterclaim seeks damages for money owed on Adcock's account and unjust enrichment. The parties differ as to the choice of law for Adcock's bailment and good faith and fair dealing claims.

DISCUSSION

A federal court sitting in diversity must apply the choice of law rule of the forum state. Klaxon v. Stentor, 313 U.S. 487 (1941); Erie Railroad v. Tompkins, 304 U.S. 64 (1938). Pennsylvania applies a flexible approach, characterized by a weighing of the relevant interests of the parties and the forum state, as well as the contacts with the respective states in light of the issues involved. Compagnie des Bauxites de Guinee v. Argonaut-Midwest Insurance Co., 880 F.2d 685, 688-89 (3d Cir. 1989). Initially, the Court must determine whether an actual, relevant conflict exists between the laws of the potentially interested states. If not, there is a false conflict and no choice

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until the beginning of the next season. Fort Wayne benefits by selling stock on hand, locking in sales and maintaining production year-round.

of law analysis is necessary. Coons v. Lawlor, 804 F.2d 28, 30 (3d Cir. 1986). If a true conflict exists, the Court shall apply the law of state which has "the most interest in the problem and which is the most intimately concerned with the outcome." In re Complaint of Bankers Trust Co., 752 F.2d 874, 882 (3d Cir. 1984).

I. BAILMENT

The parties agree that the states with an interest in Adcock's bailment claim are Indiana and Pennsylvania. There is no conflict in the general bailment law of these two states, however, Fort Wayne asserts as a defense Indiana's Fabricator's Lien Statute, Ind. Code § 32-8-37-1, et seq. This statute would provide that Fort Wayne, as possessor of Adcock's molds, could assert a lien for the amount owed to Fort Wayne for work performed with the mold. Ind. Code § 32-8-37-2. In order to assert the lien, Fort Wayne must first notify Adcock, in writing, of its intent to enforce the lien and demand payment for damages as set forth with the notice. Ind. Code § 32-8-37-3. The statute must be strictly construed as it abrogates the common law of bailment. Gibraltar Mutual Ins. Co. v. Hoosier Ins. Co., 486 N.E.2d 548, 553 (Ind. Ct. App. 1985). Since there is no demand by Fort Wayne presented to the Court, Fort Wayne cannot be entitled to this lien and there is no conflict in bailment law.

II. GOOD FAITH AND FAIR DEALING

Whether a contract creating an exclusive territory exists and was breached would be decided by law in which there is no conflict. Whether Fort Wayne breached an implied covenant of good

faith and fair dealing does raise a question of whether that claim is available. Fort Wayne asserts that Indiana, Pennsylvania and Virginia law are applicable to Adcock's claim that Fort Wayne breached an implied covenant of good faith and fair dealing. Adcock counters that the Court must consider Pennsylvania or Indiana law. The acts which Adcock alleges constitute Fort Wayne's breach of the implied covenant of good faith and fair dealing were: 1) Fort Wayne refused to provide all products ordered in the Early Buy order or necessary to service its existing accounts using Fort Wayne products, 2) Fort Wayne opened a distributorship in Virginia and appointed competing distributors in other parts of Adcock's territory, 3) Fort Wayne approached customers developed by Adcock and informed them that Fort Wayne would exclusively service their accounts and 4) Fort Wayne attempted to hire Adcock employees with the intent that those employees would bring Adcock accounts with them.

Virginia does not recognize an implied covenant of good faith and fair dealing in contracts outside of those governed by the UCC. Greenwood Assocs., Inc. v. Crestar Bank, 248 Va. 265, 270, 448 S.E.2d 399, 402 (1994). Under Pennsylvania law, there is an obligation to act in good faith in the performance of a contract. This obligation, as set forth in Restatement (Second) of Contracts, § 205(d), is variable by the context of the contract. Somers v. Somers, 613 A.2d 1211, 1213 (Pa. Super. 1992). Examples of bad faith, potentially relevant in this matter, include "evasion of the spirit of the bargain, lack of diligence and slacking off

[and] willful rendering of imperfect performance." Id.

While Indiana has not stepped as far as Pennsylvania in embracing § 205(d) of the Restatement, it has recognized an implied covenant of good faith and fair dealing can be inferred into a contract in order to effectuate the clear intent of the parties. Prudential Ins. Co. v. Crouch, 606 F.Supp. 464, 469 (S.D.Ind. 1985), aff'd, 769 F.2d 477 (7th Cir. 1986). "Where the intentions of the parties cannot be readily ascertained because of ambiguity or inconsistency in the terms of the contract . . . a court may have to presume the parties were acting reasonably and in good faith in entering into the contract." First Fed. Savings Bank v. Key Markets, Inc., 559 N.E.2d 600, 604 (Ind. 1990). Good faith in both states is defined as honesty in fact. Somers v. Somers, 418 Pa. Super. at 136, 613 A.2d at 1213; Universal C.I.T. Credit Corp. v. Shepler, 164 Ind. App. 516, 520-21, 329 N.E.2d 620, 623 (1975).

In the present case, the terms of the purported exclusive territory contract are, at best, ambiguous. Accordingly, the Court finds that this is a case where Indiana courts would apply an implied covenant of good faith and fair dealing. Therefore, there is no conflict between the law of Pennsylvania and Indiana.

To the extent that these acts took place in Virginia, they also took place in Pennsylvania and Indiana. Since the additional contacts of either Pennsylvania or Indiana outweigh the contacts of Virginia, choice of law principals require that Virginia be rejected as the choice of law on Adcock's good faith and fair dealing claim.

CONCLUSION

There are conflicting factual inferences that can be drawn from the evidence. Therefore, the cross-motions for summary judgment shall be denied. At the trial of this matter, either Indiana or Pennsylvania law will be applied to Adcock's bailment claim and breach of an implied covenant of good faith and fair dealing claims.

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O R D E R

AND NOW, this day of June, 1997, upon consideration of the Cross-motions for Summary Judgment, as well as the choice of law issues raised in the Cross-motions, the Responses and Replies thereto, it is ORDERED:

1. The Motion for Summary Judgment of Defendant Fort Wayne Pools, Inc. is DENIED.

2. The Motion for Summary Judgment of Plaintiff, W.W.

Adcock, Inc. ("Adcock") is DENIED.

3. At the trial of this matter, Count III of Adcock's Amended Complaint shall be subject to the law of either Pennsylvania or Indiana, as set forth in the forgoing memorandum.

4. At the trial of this matter, the breach of an implied covenant of good faith and fair dealing portion of Count IV of Adcock's Amended Complaint shall be subject to the law of either Pennsylvania or Indiana, as set forth in the forgoing memorandum.

BY THE COURT:

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JAMES McGIRR KELLY, J.